

Young people and pornography - legislating our way out of a social problem

Phippen, AD

<http://hdl.handle.net/10026.1/10708>

Entertainment Law Review

Sweet and Maxwell

All content in PEARL is protected by copyright law. Author manuscripts are made available in accordance with publisher policies. Please cite only the published version using the details provided on the item record or document. In the absence of an open licence (e.g. Creative Commons), permissions for further reuse of content should be sought from the publisher or author.

Young People and Pornography – Legislating Our Way Out of a Social Problem

Andy Phippen, Plymouth University. andy.phippen@plymouth.ac.uk

“The fact is that the growth of the Internet as an unregulated space has thrown up 2 major challenges when it comes to protecting our children. The first challenge is criminal and that is the proliferation and accessibility of child abuse images on the Internet. The second challenge is cultural; the fact that many children are viewing online pornography and other damaging material at a very early age and that the nature of that pornography is so extreme it is distorting their view of sex and relationships.”

The above comment comes from a speech David Cameron, the UK Prime Minister, gave in July 2013¹ around online child protection that focuses entirely on preventing young people from accessing harmful content online – in particular the gist of the speech made it very clear that pornography was the most important issue when it came to protecting children from the “dangers” of the Internet. The speech demonstrated a particular attitude toward online child safety and where solutions to child protection lie. Content is the issue and prevention from access is the solution.

This speech reflected a policy direction that had been building for a couple of years, influenced in part by the media in the UK, that aimed to place pressure on Internet Service Providers (ISPs) to ensure that young people cannot gain access to “inappropriate content”.

The approach gained a lot of support from some parts of the UK press, with headlines such as “Children grow up addicted to online porn sites: Third of 10-year-olds have seen explicit images”² demanding that service providers “do more”. This view is very direct and simple – service providers are facilitating access to such content, therefore they should stop it. It also takes another simple position – we understand the impact of pornography on young people and it is negative and damaging. The service provider response was the only one they could do under pressure from Government – propose a technical solution through the filtering of content prior to its delivery to the home (or as soon as it got to the home).

In December 2013, an agreement between the Government and the four ISPs, under which the ISPs committed to offering all new customers a family-friendly network level filtering service, was announced (in the face of a threat to ISPs that if they didn’t do something voluntarily, the Government would legislate). There was much debate around “default on” for such filters, meaning that a new subscriber would have to actively switch off filters on installation, rather than having to make the choice to have them installed. In the end a compromise of “active choice” was proposed, where the filter wouldn’t be switched on without a confirmation from the end user. However, ISPs were free to “encourage” an opt in.

However, on November 24 the European Court of Justice ruled in the SCARLET EXTENDED (BELGACOM GROUP) v. SABAM case³ that requiring Internet service providers (ISPs) to use systems “for filtering and blocking electronic communications is inconsistent with EU law”. This case hinged on an injunction on a Belgian ISP attempting to force them to filter content to protect the copyright of the creators and ensure illegal downloads cannot take place.

¹ <https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action> (Accessed Jan 2016)

² <http://www.dailymail.co.uk/news/article-2131799/Children-grow-addicted-online-porn-sites-Third-10-year-olds-seen-explicit-images.html> (Accessed Jan 2016)

³ <https://iapp.org/news/a/eu-court-of-justice-rules-isp-filtering-inconsistent-with-law/> (Accessed Jan 2016)

However, the ruling stated that ISPs “can't be made to install monitoring systems to prevent illegal downloads of copyrighted material” as it results in a monitoring of content going through their networks which contravenes Article 15(1) of the E-Commerce Directive:

Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.[ref]

In going further, and reflecting from a rights perspective we will return to later in this article, the ruling also stated that such monitoring would also “infringe the fundamental rights of the ISP's customers, namely their freedom to receive or impart information and their right to protection of their personal data.” and that content must be allowed to travel across Internet infrastructure “without discrimination, restriction or interference”.

This ruling would suggest that measures being put in place in the UK for ISPs to filter content delivered to their subscribers homes, in order to address concerns by the UK Government around children accessing “inappropriate” content, would also be unlawful.

However, such is this Government's focus on filtering as the solution to the protection of children from access to content such as pornography, it was soon announced that they would be looking to change legislation to ensure such ruling was not applicable in the UK. Speaking in the House of Commons on October 28th 2015 at Prime Minister's Questions⁴, in response to the question by Amanda Solloway MP:

“Yesterday, the EU said that we can no longer have internet filters to protect our children from indecent images. I want to know what the Prime Minister will do to ensure that our children remain protected.”

Mr Cameron stated:

“Like my hon. Friend, I think that it is vital that we enable parents to have that protection for their children from this material on the internet. Probably like her, I spluttered over my cornflakes when I read the Daily Mail this morning, because we have worked so hard to put in place those filters. I can reassure her on this matter, because we secured an opt-out yesterday so that we can keep our family-friendly filters to protect children. I can tell the House that we will legislate to put our agreement with internet companies on this issue into the law of the land so that our children will be protected.”

As a result of this ruling, the opt out places the UK at odds with the rest of Europe on this matter, but more concerning is the promise of further legislation to enshrine the need for ISPs to filter content in law. This seems to contradict an earlier agreement with service providers that if they did take action they would not be legislated. It now seems, even though ISPs did respond, the legislation will be enacted anyway.

The influence of pornography on children has also arisen in the current Independent Inquiry into Historical Child Sexual Abuse, now led by Justice Lowell Goddard⁵. Giving evidence in November 2015, Chief Constable Simon Bailey, national police lead for child protection and abuse, raised issues around the influence on pornography on minors, saying that he had

⁴ <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151028/debtext/151028-0001.htm#15102833000010>
(Accessed Jan 2016)

⁵ <https://www.iicsa.org.uk/> (Accessed Jan 2016)

seen cases of minors abusing younger children because “they see it as normal behaviour” as a result of “what they have seen online”⁶. Clearly such cases are alarming and reflect massive child protection issues. However, such cases did exist prior to the proliferation of pornography on the Internet. Causal links are difficult in a social context due to the volume of variables in human relationships and while investigation into a case might show a young offender having accessed pornography, it is difficult to then state this “proves” the pornography was the reason for the offence. It is sometimes too easy to point the finger at those issues with which we, as a society, might be uncomfortable. However, proof is more complex.

For example, in the Columbine massacre in the US in 1999⁷ when forensic examination of the offenders’ homes took place, it was shown that both had played the video game Doom. The conclusion by some was, therefore, as a result of playing a violent video game, the offenders had decided to reenact such scenes in real life. However, if this was the case, given the popularity of the game at the time (with an estimated 15-20 million people having played the game⁸) why was there not a massive increase in gun crime during the height of the game’s popularity? Similarly, it was also suggested that listening to certain types of music was “to blame” for the shooting⁹. However, we could have, I am sure, taken other factors (for example, eating habits or the viewing of innocuous TV shows) and failed to make the same “link” because, as a society, we are not biased into looking to this as a factor. In all of these extreme cases, there is rarely a single factor that can be isolated from all others to demonstrate a clear link with the behaviour of the offender.

The pornography debate is a complex one and the research on its influence on children, and indeed adults, equally difficult. From my own experiences talking to young people there is a definite interest in such content through secondary school and not just a select few – there is widespread access to pornography among the teen population, particularly for boys. And this is a concern – from a moral perspective it is rare that one would voice a view that young people accessing pornography is fine and we should just leave them to it. However, it does present some extremely complex challenges in addressing such issues, particularly if we are trying to balance rights to information with protection from harm and given it is difficult to define a solution to a problem where we do not understand the impacts.

The excellent review of the influence of pornography for the Office of the Children’s Commissioner¹⁰ came to a number of conclusions (for example, that those who commit violent sexual assaults often have viewed violent pornography), but it also quite clearly stated there is a lot we still do not know (for example, by contrast, whether accessing violent pornography causes consumers to commit violent sexual acts). And one of its very clear conclusions was that we cannot, based upon the evidence presented, make causal links between the influence of pornography on youth behaviour.

The Impact of Access to Pornography on Criminal Activity Among Minors

⁶ <http://www.theguardian.com/society/2015/nov/24/85-percent-child-abuse-england-remains-undetected-study> (Accessed Jan 2016)

⁷ Altheide, David L. (June 2009). “The Columbine Shootings and the Discourse of Fear”. *American Behavioral Scientist* **52**: 1354–70

⁸ Armitage, Grenville ; Claypool, Mark ; Branch, Philip (2006). *Networking and Online Games: Understanding and Engineering Multiplayer Internet Games*. Chichester, England: John Wiley & Sons. p. 14. ISBN 0470030461

⁹ <http://www.nytimes.com/1999/04/25/weekinreview/the-nation-the-stresses-of-youth-the-strains-of-its-music.html> (accessed Jan 2016)

¹⁰ Horvath, M.A.H., Alys, L., Massey, K., Pina, A., Scally, M., & Adler, J.R. (2013). *Basically... porn is everywhere”: A rapid evidence assessment on the effects that access and exposure to pornography has on children and young people*. London, UK: Office of the Children’s Commissioner for England.

In order to explore this in more depth, we conducted a Freedom of Information access request across all police forces in England and Wales to explore whether increased access to pornography has led to an increase in sexual crimes by minors, given the hypothesis:

Increased access to pornography by minors will result in an increase in sexual crimes by them.

This hypothesis originates from what one might refer to as “cultural prejudging” – we feel that pornography will have a detrimental impact on young people, therefore it follows that the influence will be borne out in criminal activity.

The follow Freedom of Information access request was sent to all England and Wales forces in April 2015:

Q1 Please could you provide the number of sexual offences (Home Office Offence Codes 16, 17, 17A, 17B, 18, 19A, 19B, 19C, 19D, 19E, 19F, 19G, 19H, 20, 20A, 20B, 21, 22, 22A, 22B, 23, 70, 71, 72, 73, 74, 88A, 88B, 88C, 88D, 88E) where the offender(s) are under the age of 18 for the years: 2010-2014

Q2 Would it also be possible to provide the number of arrests for people under 18 related to the same sexual offence codes for those years?

The intention being, as a result the increased prevalence of fast broadband services over across the country between 2010 and 2015, our given hypothesis could be proven. That is - if there is a clear, simple link between access to pornography and early sexualisation, we should see an increase in sexual crime by minors.

The results were collected subsequently over a number of weeks (with 38 forces returning results in total) and present a complex and inconsistent picture of criminal activity across the country. What should be made clear from the outset is that due to differences in reporting and data collection systems across forces, an overall aggregation of results was not carried out. However, each force was analysed based upon a linear regression of results over the 5 data points (in both cases, the value for the year divided by the 5 year average made into a percentage), with the calculation of the regression coefficient indicating a negative (suggesting an on average reduction over time) or positive (suggesting an on average increase over time). The results are as follows:

	Offences	Arrests ¹¹
Strongly positive (≥ 10)	9	4
Positive (≥ 0.5 and < 10)	11	4
Level (< 0.5 and > 0.5)	2	2
Negative (≤ -0.5 and > -10)	13	12
Strongly negative (≤ -10)	3	13

What is clear from this data is there is no clear trend. While in some forces there has been an increased in sexual offences committed by minors over the years, there is an almost equal number of forces such they have decreased. In terms of arrests, there has been a clear decrease across forces over the last five years.

¹¹ 3 forces did not return Arrest data

As with much data in the area, the results cannot be conclusive – for example they cover a wide range of crimes (from voyeurism and harassment to sexual assault and rape) so do not look at specific criminal activity (for example the number of rape charges against minors). Also, what is clear from my own work and that of others is that young people in a lot of cases would not recognize what we might view as “low level” sexual crimes (for example harassment) as such. They sadly view such activity as part of everyday life, as illustrated in work such as Ringrose et. al.’s 2012 report for the NSPCC¹².

Given the data presented, we have to reject our hypothesis, as there is no clear data to support this. What we can conclude from the data is that this supports the work of Horvath et al – this is a complex area and finding, and proving, causal links is extremely difficult. Therefore it is particularly concerning that the negative influence of pornography on young people is presented as fact, when it at best conjecture. While there is much research to suggest a negative impact (this is certainly something I have come across in my work where concerns such as too much access, desensitization, issues of respect and consent, body image and performance anxiety have all been raised), claiming all pornography has a negative impact on all young people cannot be supported through research, neither can we clearly state what that influence might be.

Filtering – Restricting the Rights of Young People?

This is not to say that because there is no conclusive proof, we should not be doing more try to reduce access to such content and protect children from the potential harm that might arise from its viewing. However, what is far less clear is whether a legislative approach with a singular focus on filtering is at all effective.

While filters will certainly be effective at preventing some content, they work by either blocking at a web address level (for example, making www.pornhub.com inaccessible) or by keyword matching site content to make a “decision” about the sort of content therein. For example, “gay”, “cock” or “sex” are all words a filter would look for.

The choice of these three words is deliberate. While all of these words could be used to describe sexual content, they could equally be used to describe some other form of content, such as sexuality, gender or even ornithology. If we rely on filters to ensure children cannot access content “we” have deemed harmful, we will, as a result, prevent access to a wide range of other content.

Returning to the issue of human rights resulting from the EUCJ ruling discussed above, if we are to consider potential impact of filtering of childrens’ rights, using the UN Convention on the Rights of the Children (UNCRC)¹³ as our standard, we might specifically be contravening articles 13, 17 and 29:

Article 13 (Freedom of expression): *Children have the right to get and share information, as long as the information is not damaging to them or others.*

Article 17 (Access to information; mass media): *Children have the right to get information that is important to their health and well-being.*

¹² Ringrose, Jessica, Rosalind Gill, Sonia Livingstone and Laura Harvey (2012) A Qualitative Study of Children, Young People and ‘Sexting’. London: NSPCC.

¹³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Accessed Jan 2016)

Article 29 (Goals of Education): *Children's education should develop each child's personality, talents and abilities to the fullest. It should encourage children to respect others, human rights and their own and other cultures. It should also help them learn to live peacefully, protect the environment and respect other people.*

If we refer to the Open Rights Group's Blocked project¹⁴, we can see clearly that home filtering "solutions" will frequently overblock, sometimes entirely innocent sites that contain "contentious" keywords, but sometimes extremely valuable information on sexual health, gender identity, contraception and similar. In our over-zealous need to find one "solution" to a social issue arising from the online world, we are creating many others issues.

And while Article 29 might have a broader reach than simply something complicated through filtering, we must also acknowledge that the Governments legislative obsession around "online child protection" focuses almost entirely on the responsibilities of the service provider to ensure indecent content does not reach the young recipient, rather than considering the role of education in developing resilient young people who can deal with and cope with indecent content in an informed, mature manner.

When talking to young people about how they feel we could address these they are very clear where more effective approaches to addressing these issues should lie. What is still missing from the debate around legislation to protect from the harm of pornography is effective awareness and education. In my own experiences visiting schools and talking with young people about these issues I am struck by a number of things:

- An almost complete lack of awareness of the legal and rights based issues around protection from harassment, consent, freedom of speech, etc;
- An enthusiasm to engage in discussions around the topic, asking questions, across all manner of related issues;
- A common educational experience around these issues being shown a video in assembly, rather than classroom discussion, and
- A willingness to engage in further discussion/education around the topics but no opportunity.

While it was encouraging to observe that before the May 2015 election the Education Select Committee produced a report calling for compulsory sex and relationship education in schools¹⁵, there has been little Government response to the report and in recent times such measures have been resisted. Most recently, the House of Lords voted in January 2014 against an amendment to the Children and Families Bill, which would have made compulsory SRE a requirement across all state funded schools. Just 142 peers voted for the amendment, 209 voting against, with a majority not attending at all.

Legislation that potential impacts upon all of our human rights, with little evidence of providing a solution to the problems it claims to address, where we fail to have a clear understanding of the problems caused, is something about which we should be extremely concerned. In addition, the entirely on one stakeholder in the complex relationships in online child safety and protection is doomed to fail. Service providers cannot provide the answers to this issue, as they can only, at best, restrict the delivery of content. They can do nothing regarding the impact of such content if young people do seek it out and watch it. The fact is, pornography is part of the Internet and of course some young people look for it, no matter what technological countermeasures are put in place. However, they do believe

¹⁴ <https://www.blocked.org.uk/>

¹⁵ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeduc/145/145.pdf>

they have a right to relationship and sexual education that is fit for purpose and relevant to the 21st century.